Nos. 77-753 and 77-754

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

JOHN DANIEL

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK, PETITIONERS

v.

JOHN DANIEL

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The United States urges that the petitions for a writ of certiorari be granted. The decision of the court of appeals directly affects the operation and administration of many privately sponsored pension benefit plans, which cover

millions of the nation's active and retired workers. The decision not only involves the applicability of the antifraud provisions of the federal securities laws, but the Department of Labor, the Department of the Treasury, and the Pension Benefit Guaranty Corporation believe that the decision also will substantially affect the execution of their statutory responsibilities.

The questions the petitions present are whether, for purposes of the antifraud provisions of the Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. 77a *et seq.*, and the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. 78a *et seq.* ("the Securities Acts"), an employee's interest in a collectively bargained, involuntary, non-contributory, employee pension fund is a "security," and whether the employee's acquisition of that interest is a "sale," as those Acts define those terms.

The decision below is the first and so far the only decision to have answered those questions affirmatively.

Respondent Daniel worked from 1950 to 1973 as a union truck driver for employers who made contributions on his behalf to the Local 705, International Brotherhood of Teamsters Pension Trust Fund ("Fund"), a collectively bargained, non-contributory, defined benefit pension plan. Upon his retirement, Daniel was told he was ineligible for a pension because a four-month layoff in 1961 prevented him from having 20 years' continuous employment, which the plan required for eligibility (Pet. App. 3-4). Daniel brought suit against the trustees of the Fund, Local 705, the International Brotherhood of Teamsters and others, alleging violations of the Securities Acts and other state and federal laws, and seeking, *inter alia,* recovery for harm suffered in reliance upon the defendants' alleged false and misleading representations concerning eligibility requirements.[1]

Defendants moved to dismiss the Securities Acts claims. The United States District Court for the Northern District of Illinois denied those motions, holding that Daniel had stated a claim upon which relief could be granted under the antifraud provisions of the Securities Acts. The court of appeals stated: "The effect of the [district court's] opinion is to require defendants, when offering a defined pension plan to a member, to disclose the actuarial probability, here perhaps as low as 8%, that a member actually will receive pension benefits, and factors such as risk of loss, breaks in service, death before retirement age, and plan termination, that can cause this member to be deprived of his benefits, or otherwise defendants must face fraud liability under the securities acts" (Pet. App. 8; citation omitted).

The court of appeals affirmed. It held that the employee's interest in the pension fund is a "security" and that the employee's acquisition of that interest is a "sale," as the Securities Acts define those terms. The decision obligates pension funds, their officials, and the unions and employers who sponsor such funds to comply with the antifraud provisions of the Securities Acts.[2]

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[1]The complaint also alleged violations of the union's duty of fair representation under federal labor laws, failure to comply with Section 302(c)(5) of the Labor Management Relations Act, 61 Stat. 157, 29 U.S.C. 186(c)(5), common law fraud and breach of fiduciary duty.

[2]The court of appeals emphasized that it was not holding the registration or reporting requirements of the Securities Acts applicable to pension funds (Pet. App. 49-50).

The decision has left the administrators and plan sponsors of many pension plans in considerable uncertainty as to possible liability which may arise from their past, as well as their future, conduct, and raises the possibility of significant liability for such plans as have not heretofore complied with the antifraud provisions.[3]

The Secretary of Labor and the Securities and Exchange Commission participated as *amici curiae* in the court below on opposite sides, the Secretary of Labor urging reversal of the district court's decision and the Commission urging affirmance. We have not determined what position we would take on the merits if the petitions are granted. However, we believe that the decision of the court of appeals warrants this Court's review.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JANUARY 1978.

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[3]The disclosure requirements of the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 840, 29 U.S.C. (Supp. V) 1021, *et seq.*, which did not take effect until January 1, 1975 (29 U.S.C. (Supp. V) 1031(b)(1)), and thus did not apply to this case, nevertheless were discussed by the court of appeals. The court stated that, in its view, ERISA did not preempt the antifraud provisions of the Securities Acts (Pet. App. 42-48). The court said (Pet. App. 46-47):

> Affirmance of the judgment below will supplement ERISA by providing a self-executing compulsion to disclose adequate information [at times not required by ERISA], including a statistically determinable risk that many employees covered by a plan will never receive their pension benefits. Thus the antifraud provisions of the securities acts will protect the interests of an investor before he makes an investment decision, while ERISA serves employees who have been employed for a substantial period of time at a job covered by a pension plan, protecting them from losing benefits through ignorance of the plan provisions.